

**REPLY COMMENTS OF WAYNE G. STRANG, IN THE MATTER OF THE TELEPHONE
CONSUMER PROTECTION ACT PETITIONS FOR DECLARATORY RULING DOCKET #02-278**

Background

I am a resident of the State of California interested in protecting my right to privacy through enforcement of the Telephone Consumer Protection Act (TCPA) of 1991. Through my efforts and the litigation of several small claims suits, I have gained considerable experience with, and gained knowledge of, some of the workings of the telemarketing industry.

General

I thank the Commission for giving me the opportunity to respond to the deluge of industry comments asking the Commission to declare as invalid, state laws regulating the transmission of junk faxes. In particular I respond to and fully support of the comments of Robert Biggerstaff opposing the petition of the Fax Ban Coalition (FBC) for a declaratory ruling invalidating various state laws that regulate junk faxing within their state.

In particular, the industry would like to invalidate California's recently enacted junk fax law which parrots the TCPA, but omits the ill-advised "established business relationship (EBR)" exemption for junkfaxes that the industry steamrolled through Congress. My comments will take the form of observations and suggestions rather than strictly legal arguments.

The Industry

The junk fax industry in the U.S. is thriving. Spotty enforcement of the Commission's rules by the Commission and by the public encourages violation. Junk fax providers have also become adept at evading the laws. In the case of the mortgage industry, the junk faxer will contract with the mortgage company to supply "leads". The number on the fax then leads to an answering service, sometimes a separate company, sometimes a part of the junk fax operation, that screens the caller and if "qualified", then transfers the call to the mortgage broker.

When taken to court, the mortgage company tries to establish "plausible deniability" by claiming ignorance of the faxes sent on their behalf and professing to have only bought "hot transfer" leads. This tactic has been used in all but one of the cases I have litigated over the past year.

Members of the junk fax industry have twisted the meaning of words, intentionally misled courts, and even outright lied in court¹ in order to preserve their unlawful income. Now they wish to impede the states' right to control what occurs within their own borders.

State Laws

Many states have enacted laws over the years that provide their citizens protections over and above those that Congress provided in the TCPA. California for example, has enacted a statute requiring that any prerecorded advertisement disseminated within the state, be preceded by a live, natural voice providing certain information and asking permission to play the tape².

In 2003, California also added Business & Professions Code §17590 et.seq. which makes violations, of a national Do Not Call request, no matter where the call originates, violations of California law. Curiously the industry has not targeted **this** law.

Prior to implementation of the TCPA, California also had a junk fax law that was enacted to provide California citizens with some protection until the TCPA was implemented in early 1992. This law provided that any advertising fax transmitted to a California resident, contain a telephone number which could be used to "opt-out" of any further faxes³. Junk faxers, with quite a bit of success, used this law to claim that the TCPA was preempted by the California law, or that by enacting this law, the Legislature intended to opt California out of TCPA enforcement⁴.

¹ See Notice of Apparent Liability for Forfeiture issued to Fax.com, Inc. et.al., File #EB-02-TC-120 Released August, 7, 2005, paragraph 21 and note 48

² California Civil Code §1770(a)(22)(A) enacted in 1990

³ The JFPA includes such a requirement, but only for faxes transmitted to recipients the junk faxer claims to have an "established business relationship" with.

⁴ Precisely for this reason, the law was repealed effective January 1, 2003

Because Congress diluted the effectiveness of the TCPA by enacting the JFPA, the California legislature passed, and the Governor, signed SB-833. This statute provides that unsolicited ads are not to be faxed to or from the State of California unless prior express invitation or permission is obtained from the recipient.⁵

The Proper Forum

Congress was clear in enacting the TCPA that state laws that are more restrictive than the TCPA are preserved without the necessity of undergoing a "preemption" analysis when applied to intrastate faxes.

Other laws, those less restrictive and those that are equally restrictive, must undergo an analysis to determine whether or not they are preempted. The courts abhor preemption and will strike specific words to avoid preempting any law. The Supreme Court has stated, "This Court will find preemption where it is impossible for a private party to comply with both state and federal law and where the state law is an obstacle to the accomplishment and execution of Congress's full purposes and objectives. What is a sufficient obstacle is determined by examining the federal statute and identifying its purpose and intended effects." Crosby, Secretary of Administration and Finance of Massachusetts, et.al. v. National Foreign Trade Council, 181 F.3d 38 (1st Cir.), affirmed

Thus the preemption of **any** state law is to be avoided when possible, and only the courts should make that determination.

What is left to determine is whether or not a fax that is received within the State of California can be an "intrastate" fax even if transmitted from outside the borders of the state. In making that determination, it should be the location of the **advertiser** that is important, not the location of the origination of the call or fax.

This also is a question that should be left to the courts, not to the Commission. In fact, the Commission has stated that it cannot get involved in individual cases, "...because the Commission is neither a

⁵ A Federal Court has temporarily stayed enforcement of this law until the court decides the very issue the Junk Fax Coalition wishes the Commission to improperly decide.

party to the litigation at issue nor privy to the validity of the alleged facts.”⁶

The FBC is asking the Commission to become involved in perhaps thousands of individual cases by issuing a blanket opinion that state consumer protection laws, whatever the wording or intent of the statute, are void if a state boundary is somehow involved. This would be directly akin to voiding California’s strict anti-smog laws merely because an automobile was built in another state.

Conclusion

The Commission should **deny** the numerous petitions before it seeking to void state telemarketing laws and support the comments of Mr. Robert Biggerstaff. It is up to the courts to determine whether or not those laws are void, not the Commission.

Should the Commission choose to bow to industry pressure to the detriment of the consumer, the Commission should make absolutely clear that it is the location of the **advertiser** and the sought after **consumer** that determines whether or not a fax or call is intrastate in nature. An advertiser located in California seeking the business of a California consumer should be subject to California state laws as well as the TCPA.

These determinations should be made on a state-by-state, case-by-case basis.

Wayne Strang

⁶ Letter from Daniel M. Armstrong, Associate General Counsel to the FCC, to Barry K. Roberts, Esq., June 25, 1999